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IN THE

Supreme Court of the United States

SUSAN TAVE ZELMAN, *et al.*, *Petitioners,*
v.
DORIS SIMMONS-HARRIS, *et al.*, *Respondents*

HANNA PERKINS SCHOOL, *et al.*, *Petitioners,*
v.
DORIS SIMMONS-HARRIS, *et al.*, *Respondents*

SENEL TAYLOR, *et al.*, *Petitioners,*
v.
DORIS SIMMONS-HARRIS, *et al.*, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE, INC. AND FOCUS ON THE FAMILY, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI[1]

The American Center for Law and Justice (ACLJ) is a nonprofit public interest law firm and education organization dedicated to protecting First Amendment freedoms, human life, and the family. ACLJ attorneys have briefed and argued, or presented the views of amici curiae, in numerous cases before this Court on these issues.[2]

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1. No counsel representing a party in this case authored this brief in whole or in part, and no person or entity, other than *amicus curiae* and its counsel, made a monetary contribution to the preparation and submission of this brief.

2. Counsel for amici curiae have participated in the presentation of numerous cases in this Court, including: *Board of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569 (1987); *Westside Community Schools v. Mergens*, 496 U.S. 226 (1990); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993) (42 U.S.C. § 1985(3)); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (Free Speech Clause); *Lee v. ISKCON*, 505 U.S. 672 (1992); *National Organization for Women v. Scheidler*, 510 U.S. 249 (1994) (18 U.S.C. §§ 1961-68); *United States v. Kokinda*, 497 U.S. 720 (1990) (Free Speech Clause and 39 C.F.R. § 232.1(h)(1)).

In addition, counsel for amici curiae have represented groups and individuals as amici curiae in numerous cases, including: *Board of Educ. v. Grumet*, 512 U.S. 687 (1994) (Establishment Clause); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (First Amendment Freedom of Association); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (Free Speech and Establishment Clauses); *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261 (1990) (Fourteenth Amendment); *Denver Area Educ. Telcoms. Consortium v. FCC*, 518 U.S. 727 (1996) (Cable Television Consumer Protection and Competition Act of 1992); *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992) (Free Speech Clause); *Lee v. Weisman*, 505 U.S. 577 (1992)

Focus on the Family is a California nonprofit religious corporation committed to strengthening the family in the United States and abroad. The president of Focus on the Family, James C. Dobson, Ph.D., is a child psychologist who has written extensively on child rearing and family relations.[3] Dr. Dobson hosts and Focus on the Family distributes a daily radio broadcast about family issues that reaches approximately 1.7 million listeners each day in the United States, Canada, and around the world. Focus on the Family publishes and distributes *Focus on the Family* magazine and other literature that is received by more than 2 million households each month.

The proper resolution of this case is a matter of substantial organizational concern to the American Center for Law and

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(Establishment Clause); *Madsen v. Women's Health Ctr.*, 512 U.S. 753 (1994) (Free Speech Clause); *Natl. Interfaith Cable v. FCC*, 512 U.S. 1230 (1994) (Establishment Clause and the Cable Television Consumer Protection and Competition Act of 1992, §§ 4 and 5); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (Fourteenth Amendment); *Reno v. ACLU*, 520 U.S. 1113 (1997) (Communications Decency Act); *Romer v. Evans*, 517 U.S. 620 (1996) (Equal Protection Clause); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (Free Speech and Establishment Clauses); *Rust v. Sullivan*, 500 U.S. 173 (1991) (42 U.S.C. §§ 300-300a-6 and 42 C.F.R. §§ 59.8-59.10); *Troxel v. Granville*, 530 U.S. 57 (2000) (Fourteenth Amendment); *Webster v. Reproductive Health Serv.*, 492 U.S. 490 (1989) (Fourteenth Amendment).

3. Dr. Dobson hosted a six-part film series, entitled "Turn Your Heart Toward Home," the display of which in a public school facility was at issue in a prior decision of this Court. *See Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 388 nn. 2-3 (1993).

Justice and to Focus on the Family because of their shared commitment to American families. These amici recognize that the primary responsibility for directing and controlling the upbringing and education of children belongs to the parents and guardians of those children. That responsibility is paired with the right of parents to select the schools in which their children will be educated. Choice in schooling is necessary for the right to direct and control the education of a child to have any substantive meaning. For that right to be meaningful, and so that it may be maximized, it is entirely appropriate for the States to establish appropriate mechanisms to assist parents in obtaining a meaningful slate of choices in schooling for their children.

In the view of these amici, the Ohio voucher program is an appropriate means to the end of meaningful parental choice in education. All that is done by a voucher system of the kind enacted in Ohio is that the playing field begins to be leveled. Ohio neither purposed to violate the Establishment Clause, nor does the Ohio voucher program have the primary effect of doing so, or of endorsing religion. Nonetheless, the appeals court misinterpreted this Court's Establishment Clause cases in reaching the conclusion that the Ohio program was unconstitutional. School voucher systems that facilitate meaningful parental choice in schooling, through assistance in funding those parental decisions, neither violate the Establishment Clause nor contradict this Court's jurisprudence regarding the Clause.

SUMMARY OF ARGUMENT

The Cleveland school district suffered from such serious mismanagement in providing an acceptable academic education

that it was taken from the control of local elected officials and placed under the direct control of Ohio's State Superintendent of Public Instruction. *See Simmons-Harris v. Zelman*, 234 F.3d 945, 948 (6th Cir. 2000). Among those injured by that mismanagement are the students attending Cleveland schools whose families have such limited financial resources as to make it virtually hopeless that some alternative to the failed Cleveland schools will be available to them. Given the dire circumstances of such students, and the crisis created by the patterned mismanagement of a large urban school district, the State of Ohio responded quite reasonably and thoughtfully.

Ohio enacted a pilot program of vouchers to allow the children of low-income families in Cleveland to escape the deprivations resulting from the district's mismanagement. Under the program now under consideration in this Court, students and families can select from a list of participating schools. Vouchers provided for under the program are sent to the schools *chosen by the families*. In turn, the families go to the schools and endorse the voucher to validate it. Schools eligible to register for and participate in the program include private schools – both secular and religious – located within the Cleveland school district, and public schools in the school districts adjacent to Cleveland.

In the face of this eminently reasonable response to a crisis caused by a failed public schooling system, the Respondents and the court below have asserted that the Ohio voucher program has the primary effect of establishing religion because it accomplishes an actual diversion of government funds to private religious institutions. *See Simmons-Harris v. Zelman*, 234 F.3d 945, 960-61 (6th Cir. 2000). The Court of Appeals purported to apply the reasoning of Justice O'Connor's separate

concurrence in *Mitchell v. Helms*, 530 U.S. 793, 836 (2000) (O'Connor, J, with Breyer, J., concurring in the judgment), *see Simmons-Harris*, 234 F.3d at 958, which, in turn, adopts the rationale in *Agostini v. Felton*, 521 U.S. 203 (1997). The court below, however, failed to make the analysis called for in *Agostini* and in Justice O'Connor's *Mitchell* concurrence. Had the court done so, it would have concluded that the Ohio voucher program survives constitutional scrutiny under the Establishment Clause.

First, the Respondents concede that the purpose for the program is secular. Second, they also concede that there is no excessive entanglement with religion. Finally, as we explain below, the primary effect of the Ohio voucher program is to provide needed assistance to students doubly handicapped by living in low-income circumstances and within the boundaries of a failed school district. Although the court below found a constitutional violation in this plan, this Court should reverse the decision below and uphold the voucher program at issue

ARGUMENT

IN ACCORD WITH THIS COURT'S DECISION IN *AGOSTINI* AND WITH THE CONCURRENCE BY JUSTICE O'CONNOR IN *MITCHELL*, THE JUDGMENT BELOW MUST BE REVERSED.

A. The Ohio Voucher Program Is Governed By The Scrutiny Called For by Justice O'Connor's Concurrence in *Mitchell*

This Court has explained, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may

be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Marks v. United States*, 428 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)). In light of that instruction, the appeals court decided the case below by invoking the reasoning offered in the concurring opinion of Justice O'Connor in *Mitchell v. Helms*, 530 U.S. 793, 836 (2000) (O'Connor, J, with Breyer, J., concurring in the judgment). The court below looked to that opinion in *Mitchell* because it was the concurrence of Justices O'Connor and Breyer in the judgment, expressed in that concurring opinion, that resulted in a decision by a majority of the Justices to reverse the judgment in *Mitchell*. *See Simmons-Harris v. Zelman*, 234 F.3d 945, 958 (6th Cir. 2000).

The problem, however, is that the court erred in its application of the rationale offered by Justice O'Connor. Tellingly, the panel below fails to bring to bear on this controversy the principal points of analysis relied on by Justice O'Connor in her concurrence in *Mitchell*. But, because the court below claimed that it was applying Justice O'Connor's methodology in deciding that the Ohio voucher program violated the Establishment Clause, it is necessary to demonstrate that the assertion is quite flawed.

In *Mitchell v. Helms*, Justice O'Connor rejected the decisional approach taken by the plurality because, in Justice O'Connor's view, the plurality "announce[d] a rule of unprecedented breadth for the evaluation of Establishment Clause challenges to school-aid programs." 530 U.S. at 837. To Justice O'Connor, "[r]educed to its essentials, the . . . rule states that government aid to religious schools does not have the effect of advancing religion so long as the aid is offered on

a neutral basis and the aid is secular in content." *Id.*

Particularly troubling to Justice O'Connor were two features of the plurality opinion. First, "the plurality's treatment of neutrality comes close to assigning that factor singular importance in the future adjudication of Establishment Clause challenges to government school-aid programs." *Id.* Second, "the plurality's approval of actual diversion of government aid to religious indoctrination is in tension with our precedents and, in any event, unnecessary to decide the instant case." *Id.*

While it troubled her that the plurality adopted a near absolute principle of neutrality as the sole test for Establishment Clause sufficiency, Justice O'Connor nonetheless acknowledged in *Mitchell* that "neutrality is an important reason for upholding government-aid programs against Establishment Clause challenges." *Id.* (citing cases). In addition, while the plurality expressed a willingness to tolerate diversion of government school-aid to the religious purposes of sectarian schools, Justice O'Connor concluded that the Court's jurisprudence on this issue allowed for "some government funding of *secular* functions performed by sectarian organizations," but "provide no precedent for the use of public funds to finance religious activities." *Id.* at 840 (emphasis added). In Justice O'Connor's view, the plurality missed a salient feature of previous decisions in which aid may have been diverted (or divertible), namely, that the aid went directly to individuals, and only secondarily, as a result of the individual choices of aid recipients, to private and religious institutions. *Id.* at 841 (discussing cases).

Ultimately, Justice O'Connor concluded that the proper rule for decision in *Mitchell* was the one announced in *Agostini v.*

Felton, 521 U.S. 203, 222-23, 234, 235 (1997). In *Agostini*, this Court highlighted the governing standards for deciding Establishment Clause challenges to school-aid programs:

> [T]he general principles we use to evaluate whether government aid violates the Establishment Clause have not changed . . . . [W]e continue to ask whether the government acted with the purpose of advancing or inhibiting religion, and the nature of that inquiry has remained largely unchanged. Likewise, we continue to explore whether the aid has the 'effect' of advancing or inhibiting religion. What has changed . . . is our understanding of the criteria used to assess whether aid to religion has an impermissible effect.

Agostini, 522 U.S. at 222-23 (citations omitted); *see also Mitchell*, 530 U.S. at 845. Under Justice O'Connor's rationale, *Agostini* governs the decision of this case.

Consequently, this Court must ask whether the government acted to advance or inhibit religion, whether the government aid program had the effect of doing so, and whether the government program endorses religion. 530 U.S. at 844-45.

B. The Ohio Voucher Program Satisfies the Constitutional Standards of the *Mitchell* Concurrence and *Agostini*

The Court of Appeals failed to make a faithful and rea[illegible]oned application of the principles outlined in *Agostini* and in the *Mitchell* concurrence. Beyond barely stating the intention to apply the rationale of those two opinions, there is little similarity between the decision below and those two opinions. As demonstrated below, the application of the factors

considered relevant by Justice O'Connor in *Mitchell*, and upon which this Court decided *Agostini*, leads ineluctably to the conclusion that the Ohio voucher program is constitutional.

(1) *The Ohio voucher program was not enacted for the purpose of advancing religion.*

The Ohio Legislature did not adopt the voucher program at issue here for the purpose of advancing religion. Respondents have never contended otherwise. This point is uncontradicted. As the district court explained, "[a]t the outset, it is important to note that Plaintiffs do not challenge the secular purpose of the Voucher Program." *Simmons-Harris v. Zelman*, 72 F. Supp. 2d 834, 844 n.6 (N.D. Ohio 1999).

(2) *The Ohio voucher program does not have the effect of advancing religion.*

Both *Agostini* and the *Mitchell* concurrence reason that this Court, in deciding whether aid has the effect of advancing or inhibiting religion, will look to three considerations: (1) does the aid result in government indoctrination of religion; (2) does the aid program define recipients by reference to religion; and, (3) does the program create excessive entanglement between government and religion. *Id.* at 845.

(a) The Ohio voucher program does not result in government indoctrination of religion

To determine whether the vouchers supplied in the Ohio voucher program result in government indoctrination of religion, several relevant factors may be considered. *See Mitchell*, 530 U.S. at 846-48 (concurrence).

First, the aid is allocated according neutral, secular criteria.

As the court below explained:

> The program provides scholarships to children residing within the applicable district in grades kindergarten through eighth grade. The program gives preference to students from low-income families, defining them as those whose families' income is less than 200% of the poverty line. Scholarships may be awarded to students who are *not* from low-income families *only if* all students from low-income families have been given first consideration for placement. Over sixty percent of the children receiving scholarships in the program are from families with incomes at or below the poverty line.

234 F.3d at 948 (citations and internal quotation marks omitted).

Second, in the same way that the Title I instructors were provided to students in both the public and private schools of New York City, the vouchers here are provided to the students and their families without regard to the choice of school that they make within the program. *Agostini*, 521 U.S. at 226; *Mitchell*, 530 U.S. at 848.[4] Under the Ohio program, private schools – both secular and religious – located within the

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4. *Cf. Mueller v. Allen*, 463 U.S. 388 (1983) (no Establishment Clause violation in statute authorizing tax deduction for educational expenses without regard to parental choice of public or private schools); *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986) (no Establishment Clause violation when State's funds were used by visually impaired student to study at religious school); *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993) (no Establishment Clause violation in providing sign language interpreter to hearing impaired student without regard to parental choice of public or private schools).

Cleveland school district that "meet the State's education standards" are eligible to be designated as participants, 234 F.3d at 948, as are "[p]ublic schools in districts adjacent to the district in which the voucher program is implemented . . . ." *Id.* at 949.[5]

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5. The court below concluded that the inability of participating students and their families to use their vouchers to attend public schools made a signal difference between this case and *Agostini*. *See Simmons-Harris*, 234 F.3d at 959 ("The alleged choice afforded both public and private school participants in this program is illusory in that the program's design does not result in the participation of the adjacent public schools from outside the Cleveland school district"). The appeals court misapprehends, however, the governing principle. The Ohio voucher program invites and makes possible the participation of private, secular schools, private religious schools, and public schools. 234 F.3d at 948-49. But, the appeals court noted, the public schools eligible to participate have declined, so far, to do so. The court below made that refusal of those schools to participate in the program a deciding factor of constitutional significance in striking down the voucher program. So, as the Court of Appeals reasoned it, the unexplained inability or unwillingness of public schools to participate in the program, despite their eligibility to do so, made the State's decision to create a religion-neutral program into an illegitimate establishment of religion.

Proponents of the status quo ante in education and in education funding have powerful incentives to discourage public school cooperation in programs testing the viability and utility of vouchers. These proponents view empowering parental choice in education as threatening one day to challenge the *de facto* primacy of public schools. That some eligible schools choose not to participate in an education reform program may suggest more about the politics of certain recalcitrant public school officials than it does about the Establishment Clause.

Third, although State education aid dollars actually will reach the "coffers" of private, religious schools under the Ohio voucher program, that result, as in *Witters*, will occur only because of the truly independent choices of private individuals (namely the low-income or other families that receive vouchers under the program). As the appeals court explained:

> Each scholarship for children attending a private school is payable to the parents of the student entitled to the scholarship. Scholarship checks are mailed to the school selected by the parents, where the parents are required to endorse the checks over to the school in order to pay tuition.

Simmons-Harris, 234 F.3d at 948 (citation omitted). This "funding" is, in principle, no different than a refundable tax credit that parents may use at the educational institution of their choice. *Cf. Mueller*.

Taken together, these three factors amply demonstrate that there is neither any government indoctrination of religion presented by the Ohio voucher program, nor any cognizable danger of such indoctrination under the program. In this respect, Justice O'Connor's recapitulation of *Agostini* is instructive. In *Agostini*, this Court, rather than presuming that a "symbolic union" arose when government teachers entered onto the grounds of parochial schools, concluded instead "that in the absence of evidence showing that teachers were actually using the Title I aid to inculcate religion, we would presume that the instructors would comply with the program's secular restrictions." *Mitchell*, 530 U.S. at 847; *Agostini*, 521 U.S. 223-24, 226-27.

Moreover, unlike the Title I program at stake in *Agostini*, the Ohio voucher program includes an additional feature that makes government indoctrination unlikely. In the Title I program, *public school* remedial teachers visited public and private schools to conduct their federally-funded remedial instruction programs. Because the public school teachers actually taught the instructional materials, there was a risk – perceived or real – that they might become involved in religious indoctrination. Here, however, no public school teachers are dispatched to religious schools to carry out instructional functions. For this reason, the opportunity for such teachers to engage in government indoctrination of religion is eliminated.

(b) The Ohio voucher program does not define benefit recipients by reference to religion

As noted above, the Ohio voucher program does not define recipients of vouchers by reference to religion. Instead, as the Court of Appeals recognized, the Ohio program defines recipients according to two, distinctly nonreligious, points of reference. 234 F.3d at 948. First, participation is limited to students and families in school districts that, by reason of their mismanagement, have been placed under the direct supervision of the State Superintendent of Schools.[6] Second, the Ohio

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6. 234 F.3d at 948 ("In 1995, Ohio's General Assembly adopted the Ohio Pilot Project Scholarship Program . . . in response to an order by the United States District Court that placed the Cleveland School District under the direct management and supervision of the State Superintendent of Public Instruction due to mismanagement by the local school board. The voucher program covers any state school district that has been the subject of a federal court order requiring supervision and operational management of the district by the state

voucher program defines recipients in terms of family income. *Id.* Specifically, the program is available, in the first instance, to students from "low-income" families (families with combined incomes up to twice the federally defined poverty line). Other families are eligible to participate only after all students from low-income families have been accommodated. *Id.* Neither failed management of a school district nor income level remotely resembles a religious referent.

(c) The Ohio voucher program does not create excessive entanglement between government and religion.

The Ohio voucher program does not create excessive entanglement between government and religion. Nor have Respondents contended otherwise. As the district court explained, "there has been no challenge that it creates an excessive entanglement between church and state." *Simmons-Harris*, 72 F. Supp. 3d at 864.

(3) *The Ohio voucher program does not endorse religion.*

In *Agostini*, after analyzing the three primary criteria also adopted by Justice O'Connor in her *Mitchell* concurrence, the Court further concluded that the Title I program did not constitute an impermissible endorsement of religion:

> New York City's Title I program does not run afoul of any of three primary criteria we currently use to evaluate whether government aid has the effect of advancing religion . . . . We therefore hold that a federally funded program providing supplemental, remedial instruction to

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superintendent") (citation and internal quotation marks omitted).

> disadvantaged children on a neutral basis is not invalid under the Establishment Clause when such instruction is given on the premises of sectarian schools by government employees pursuant to a program containing safeguards such as those present here. *The same considerations that justify this holding require us to conclude that this carefully constrained program also cannot reasonably be viewed as an endorsement of religion.*

21 U.S. at 234-35 (emphasis added). In particular, this Court looked to its prior decisions in two cases in illuminating the absence of endorsement in the Title I program. *See id.* (citing *Witters v. Washington State Dep't of Serv. for the Blind*, 474 U.S. 481, 488-489 (1986); *Bowen v. Kendrick*, 487 U.S. 589, 613-14 (1988)).

Under the Ohio voucher program, schools eligible to participate include *all* private schools, whether religious or not, in the Cleveland school district, and also the public schools of school districts adjacent to the Cleveland district. 234 F.3d at 948-49. The families and students that are selected (using religion-neutral criteria) decide for themselves the participating school to which they will send their voucher and their child. Thus, the Ohio voucher program is much like the rehabilitation training and assistance at issue in *Witters*.

In *Agostini*, 521 U.S. at 235, this Court explained that no endorsement resulted from the program at issue in *Witters*: "'The mere circumstance that [an aid recipient] has chosen to use neutrally available state aid to help pay for [a] religious education [does not] confer any message of state endorsement of religion.'" 521 U.S. at 235 (quoting *Witters*, 474 U.S. at 488-

89). In effect, the private choice of the intervening actor removes any attribution of the religious selection to government actors, thus eliminating any supposed endorsement that might otherwise follow government funds to religious institutions. Here, the very same sort of private intervening decision alleviates any apparent endorsement that might otherwise be alleged to arise from the Ohio voucher program.

Under the Ohio voucher program, state funds are made available *neutrally* for the education of students from low-income families in the affected school district. The neutrality of the program is patent. No provision of the program gives preference in priority or funding to religious schools or to the choice by beneficiary families of such schools. In fact, a religious school's mere eligibility to participate does not guarantee the matriculation of even a single student whose voucher will pay for schooling. If the State of Ohio only permitted parochial schools to participate, that circumstance would certainly present a case of "symbolic union" of state and religion. But here there is no lurking danger of a perceived endorsement resulting from a "symbolic union" between private religious schools and Government in the Ohio voucher program. *See Agostini*, 521 U.S. at 235 (citing *Bowen*, 487 U.S. at 613-14).

Because the Ohio voucher program avoids any "symbolic union" between religion and government, and because the private, intervening choice of an individual student and his family is the sole factor in determining whether a voucher will go to a secular or a religious school, no danger of perceived endorsement exists. Indeed, the discriminating *exclusion* of religious schools, and only religious schools, from participation

in the program would send a message of hostility inconsistent with the Establishment Clause. *See Good News Club v. Milford Cent. Sch.*, 121 S. Ct. 2093, 2106 (2001); *Westside Comm. Schools. v. Mergens*, 496 U.S. 226, 248 (1990) (plurality); *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819, 844-46 (1995).

CONCLUSION

For the foregoing reasons, the decision of the court below should be reversed.

Respectfully submitted,

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